

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB -5 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NEALE E. SMITH,)	
)	2 CA-CV 2009-0082
Plaintiff/Appellant,)	2 CA-CV 2009-0086
)	(Consolidated)
v.)	DEPARTMENT A
)	
DPS OFFICER JOHNSTON, BADGE)	<u>MEMORANDUM DECISION</u>
# 355; DPS OFFICER SEYLER,)	Not for Publication
BADGE # 334; DPS OFFICER)	Rule 28, Rules of Civil
FRANZ, BADGE # 204; DPS)	Appellate Procedure
OFFICER COLLIER HILL;)	
BRYAN ALAN LONOWSKI;)	
JOHNSON BIA; CECILIA E. LOU;)	
FERNANDO MUNGUIA; ROY)	
FLORES; PIMA COMMUNITY)	
COLLEGE; PIMA COUNTY)	
BOARD OF SUPERVISORS;)	
BARBARA LaWALL; VARIOUS)	
UNKNOWN ASSISTANT PIMA)	
COUNTY PROSECUTORS; JANET)	
NAPOLITANO; TERRY)	
GODDARD; and STATE OF)	
ARIZONA,)	
)	
Defendants/Appellees.)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20065166

Honorable Virginia Kelly, Judge

AFFIRMED

Neale E. Smith

Tucson
In Propria Persona

Terry Goddard, Arizona Attorney General
By Daniel P. Schaack and Richard P. Broder

Phoenix and Tucson
Attorneys for State
Defendants/Appellees

Jones, Skelton & Hochuli, P.L.C.
By Eileen Dennis GilBride, Steven D. Leach
and Shannon M. Ivanyi

Phoenix
Attorneys for
Defendants/Appellees Johnston,
Seyler, Frantz, Hill, Bia, Lou,
Munguia, Flores, and Pima
Community College

Barbara LaWall, Pima County Attorney
By James M. Wilkes

Tucson
Attorneys for
Defendants/Appellees LaWall
and Various Unknown Assistant
Pima County Prosecutors

E S P I N O S A, Presiding Judge.

¶1 Neale Smith appeals the trial court's denial of his motions for reconsideration filed pursuant to Rule 60(c), Ariz. R. Civ. P., after it refused to vacate a judgment this court had previously affirmed. He also appeals the trial court's imposition of attorney fees. We affirm.

Factual and Procedural History

¶2 In 2006, Smith sued several state and county employees as well as the Pima Community College and several of its employees concerning the investigation of a traffic

accident and his subsequent prosecution for related criminal charges. The trial court dismissed the suit and Smith appealed. This court affirmed the dismissal, finding Smith's failure to comply with the notice-of-claim statute barred his claim and any relief he sought. *See Smith v. Johnston*, Nos. 2 CA-CV 2007-0145, 2 CA-CV 2007-0061 (consolidated) ¶ 17 (memorandum decision filed Sept. 19, 2008). Our subsequent mandate of the case directed the trial court "to conduct such proceedings as required to comply" with our memorandum decision.

¶3 Smith apparently interpreted the mandate as granting the trial court the authority to overturn our memorandum decision. He filed several "motions for reconsideration" pursuant to Rule 60(c), Ariz. R. Civ. P., in which he criticized our decision.¹ The trial court found no legal grounds for relief and denied the motions. In a separate ruling, the court barred Smith from filing any future pleadings on these issues and awarded the community college defendants their attorney fees incurred in responding

¹After we issued our memorandum decision, Smith filed a motion for reconsideration, which we denied. He devotes a substantial portion of his argument in his current appeal to the same point he had raised in that motion and argues our decision was incorrect. Having already ruled on these issues, we do not address them again. Smith also challenges the validity of A.R.S. § 12-821.01, the notice-of-claim statute on which our decision was based and contends the defendants had not raised the issue below, thus barring us from relying on it in our previous decision. Even if these arguments had merit, they could only have been raised in a motion to reconsider filed in this court within the time period set forth in Rule 22(b), Ariz. R. Civ. App. P., or in a petition for review to our supreme court. Smith did not timely pursue either manner of relief and we therefore do not consider these claims. *See* Ariz. R. Civ. App. P. 22(b) (motion for reconsideration must be filed within fifteen days after filing of decision by appellate court); Ariz. R. Civ. App. P. 23(a) (petition for review to supreme court must be filed with clerk of Court of Appeals within thirty days after the filing of a decision).

to Smith's motions.² Smith appealed from both rulings and we have consolidated the two appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A) and 12-2101(C).

Discussion

¶4 We review the denial of post-judgment relief under Rule 60 for an abuse of discretion. *See Birt v. Birt*, 208 Ariz. 546, ¶ 9, 96 P.3d 544, 547 (App. 2004). Smith's challenge to the trial court's denial of his Rule 60 motions, however, is completely meritless, and, to the extent we can understand it, constitutes nothing more than a claim that the trial court erred in refusing to ignore our previous memorandum decision. Our decisions are binding on the lower courts of this state, however, and they have no discretion to disregard them. *See Francis v. Ariz. Dep't of Transp.*, 192 Ariz. 269, ¶ 10, 963 P.2d 1092, 1094 (App. 1998). Moreover, our previous decision here is binding on the parties and the superior court as law of the case. *See Flores v. Cooper Tire & Rubber Co.*, 218 Ariz. 52, ¶ 23, 178 P.3d 1176, 1181 (App. 2008) (law of the case doctrine bars review of legal issues determined in previous appeal of same case); *Cyprus Bagdad Copper Corp. v. Ariz. Dep't of Rev.*, 196 Ariz. 5, ¶ 7, 992 P.2d 5, 7 (App. 1999) (trial court may not consider on remand any issue resolved by appellate court). We will not find an abuse of discretion where the court had no discretion in which to act. And having

²Although we have been unable to find the trial court's decision awarding attorney fees in the record on appeal, the defendants have attached copies of it to their briefs.

already ruled on Smith's motion to reconsider our previous memorandum decision, we do not revisit it.³

¶5 Smith also appeals the trial court's orders awarding defendants their attorney fees pursuant to A.R.S. § 12-349 and precluding Smith from filing any further pleadings in this dismissed case.⁴ We review an award under § 12-349 for clear error. *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997). As the appellees point out in the answering briefs, Smith filed several, repetitious, meritless motions and pleadings in the trial court following remand, each challenging our memorandum decision. Even after the trial court denied his first motions, he continued to file additional ones, raising the same arguments. The imposition of attorney fees as a sanction is appropriate when a party "[u]nreasonably expands or delays the proceeding,"

³Smith appears to believe that because in our earlier memorandum decision we found one issue dispositive and did not reach the remaining issues he had raised, the unaddressed issues are unresolved. But when a case is dismissed with prejudice for any reason, even for a procedural defect as in this case, the pleadings are dismissed in total and the court does not address their merits. *See Maricopa-Stanfield Irr. & Drainage Dist. v. Robertson*, 211 Ariz. 485, ¶ 40, 123 P.3d 1122, 1129 (2005) (dismissal for failure to state a claim constitutes judgment on merits and is res judicata for any other issues in case). Accordingly, our affirmance of the dismissal of Smith's complaint also disposed of all related issues, including those on which neither we nor the trial court had specifically ruled. *See also 4501 Northpoint LP v. Maricopa County*, 212 Ariz. 98, ¶ 17, 128 P.3d 215, 218 (2006) (order dismissing case with prejudice is final judgment on merits).

⁴Smith does not explain how the court erred in barring his future filings in this case. Accordingly, this argument is waived. *See Phelps Dodge Corp. v. Ariz. Elec. Power Coop, Inc.*, 207 Ariz. 95, ¶ 117, 83 P.3d 573, 600 (App. 2004) (argument waived when not developed).

§ 12-349(A)(3), the reason cited in the trial court's ruling. We also reject Smith's contention that the trial court did not comply with A.R.S. § 12-350, which requires a court to specifically state why it awarded a party attorney fees pursuant to § 12-349. As noted, the trial court expressly found that Smith's repetitive filings unreasonably delayed and expanded the proceedings.⁵

¶6 Finally, in one of his reply briefs, Smith argues the trial court's ruling was invalid as a result of what he claims were irregularities in the assignment of the trial judge. Even if this argument had merit, it would be waived because we do not consider issues raised for the first time in a reply brief. *See Malad, Inc. v. Miller*, 219 Ariz. 368, ¶ 26, 199 P.3d 623, 628 (App. 2008).

¶7 The community college defendants have requested their attorney fees on appeal. Pursuant to Rule 25, Ariz. R. Civ. App. P., we have the discretion to award attorney fees when an appeal is frivolous. As noted above, Smith's appeal, like his repetitive motions below, lacks any semblance of merit and is a clear example of a frivolous proceeding. Accordingly, we grant the defendants' request upon their compliance with Rule 21, Ariz. R. Civ. App. P.

⁵Smith takes exception to the trial court's statement that "no rule permits the repetitive filing of motions for reconsideration." His argument appears to be that Rule 7.1(e), Ariz. R. Civ. P., allows multiple filings because in the second sentence of the rule, it refers to motions for reconsideration in the plural. He ignores, however, the first sentence of this rule, which permits a party to file "*a* motion for reconsideration," indicating a single motion for any given ruling. Ariz. R. Civ. P. 7.1(e) (emphasis added).

Conclusion

¶8 The trial court's denial of Smith's motion for post-judgment relief as well as its award of attorney fees are affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge